Supreme Court, U.S.
FILED

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No. 95-837 NOV 27 1995

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In The

Supreme Court of the United States

October Term, 1995

RANDY JORDAN,

Petitioner,

vs.

HAWKER DAYTON CORPORATION and EAST DAYTON TOOL & DIE CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

N. LAURENCE WILLEY, JR.
Counsel of Record
LAURIE ANNE MILLER
FERRIS, DEARBORN & WILLEY
Attorneys for Petitioner
P.O. Box 609
120 North Main Street
Brewer, Maine 04412
(207) 989-3366

7829
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

1. Should the federal courts recognize successor corporate liability in the area of products liability litigation when products are transferred through interstate commerce?

2. Is there an independent tort of failure to warn by a successor corporation, when receiving knowledge of the defect, recognized in federal courts for products transferred in interstate commerce when the successor corporation continues to actively service and transact the same business with the same customers of its predecessor corporation which manufactured the product?

3. Is a corporate division, transferred from one corporation to another, the same entity for purposes of product liability litigation and thus no actual successor corporation?

4. Is it the policy of the federal courts to permit a manufacturer to spin off its division to a new manufacturer to avoid liability for product defects?

5. Does the corporate opportunity doctrine recently adopted by the Maine Supreme Judicial Court have any application?

6. Did the court err in declining to certify the question of successor corporate liability to the Maine Supreme Judicial Court?

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioner is Randy Jordan, an individual United States citizen, who resides in Pittsfield, County of Somerset, State of Maine.

The Respondent is Hawker-Dayton Corporation, a corporation duly organized and existing under the laws of the State of Ohio. The corporation does business under the trade name of Hawker Manufacturing Company.

The second Respondent is East Dayton Tool & Die Co., a corporation that was duly organized and existing under the laws of the State of Ohio at the time the Complaint and Amended Complaint were filed and the Judgment against it was rendered. Since the entry of Judgment, the Defendant has filed liquidation papers with the State of Ohio. This corporation also held a division that did business as Hawker Manufacturing Company. To the Petitioner's knowledge, neither corporate Defendant had parent companies or subsidiaries.

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October Term, 1995

RANDY JORDAN,

Petitioner,

vs.

HAWKER DAYTON CORPORATION and EAST DAYTON TOOL & DIE CO.,

Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

NOW COMES the Petitioner, Randy Jordan, by and through his attorneys, Ferris, Dearborn & Willey, and hereby petitions this Honorable Supreme Court for a Writ of Certiorari to review a judgment of the Court of Appeals for the First Circuit issued in this case.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals is reported in 62 F.3d 29 (1995). It is also found in the Appendix to this Petition for Writ of Certiorari.

The decisions of the United States District Court for the District of Maine on Petitioner's Motion for Summary Judgment and on Respondent Hawker-Dayton Corporation's Motion for Summary Judgment are unreported. Both decisions appear in the Appendix to this Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The First Circuit Court of Appeals entered judgment after oral argument in this case on August 10, 1995. A Petition for Rehearing was timely filed with the First Circuit on or about August 23, 1995. The First Circuit Court of Appeals denied the Petition for Rehearing by decision dated August 29, 1995.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES, AND/OR REGULATIONS INVOLVED

This matter does not directly involve constitutional provisions, statutes, treaties, ordinances, and/or regulations. It involves common law principles and its effect on interstate commerce.

STATEMENT OF THE CASE

This case involves a claim for personal injuries sustained by the Petitioner while using a doweling machine manufactured by the Hawker Manufacturing Company, a division of East Dayton Tool & Die Company. While Petitioner attempted to unjam the machine, the cutting blades amputated his hand, causing serious physical and emotional injury.

The Petitioner filed a products liability action against Hawker-Dayton Manufacturing Co. for his injuries. The parties engaged in discovery during which Petitioner learned the doweling machine upon which he was injured was actually manufactured by Hawker Manufacturing Co., a subdivision of another Ohio corporation, East Dayton Tool & Die Company. The Petitioner also learned of various connections, including familial ones, between the two corporations. After learning this information, Petitioner filed a Motion to Amend the Complaint to correctly identify Respondent Hawker Dayton Corporation, to include additional theories of liability against Respondent Hawker Dayton Corporation, and to add East Dayton Tool & Die Co. as a defendant. On March 7, 1994, the court granted the Petitioner's Motion to Amend Complaint to correctly identify the Respondent Hawker Dayton Corporation and to add East Dayton Tool & Die Co. as a defendant. The court denied the Motion to Amend with respect to the inclusion of additional claims against Hawker Dayton Corporation. Petitioner also filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the issue of successor corporate liability against Respondent Hawker Dayton Corporation. The motion was denied. The Respondent filed a countermotion for summary judgment on that issue. On May 20, 1994 the court denied Petitioner's Motion for Summary Judgment.

With the addition of East Dayton Tool & Die Co. as a defendant, further discovery was conducted. On October 31, 1994, Respondent Hawker Dayton Corporation filed its Motion for Summary Judgment on the issue of successor corporate liability, relying on the same affidavits and statement of facts it submitted with respect to Petitioner's motion. The Petitioner objected and countermoved for summary judgment on that issue. On December 23, 1994, the court granted the Respondent's Motion for Summary Judgment.

With respect to the Co-Respondent, East Dayton Tool & Die Co., counsel for the Respondent was allowed to withdraw. No new counsel filed an appearance. Petitioner filed a motion for default and a hearing on damages was held. On February 14, 1995, judgment by default was entered against Respondent East Dayton Tool & Die Co. in favor of Petitioner in the amount of $2,230,088.21. As this judgment disposed of all remaining claims, it was a final judgment.

The Petitioner filed a timely Notice of Appeal with the First Circuit Court of Appeals. From its decision, the Petitioner seeks this Court's review.

STATEMENT OF ORIGINAL JURISDICTION

The Petitioner properly and timely filed this products liability action in the United States District Court for the District of Maine. The District Court had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1332(a) which provides, in pertinent part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between (1) citizens of different States; . . .". In this products liability action, the amount in controversy exceeded $50,000, exclusive of interest and costs. [On February 14, 1995, a judgment by default was entered against Respondent East Dayton Tool & Die Company in the amount of $2,230,088.21.] The Petitioner in the action below, Randy Jordan, an individual, is a resident of the State of Maine. Both Respondents, East Dayton Tool & Die Co. and Hawker Dayton Corporation, were corporations duly organized and existing under the laws of the State of Ohio and were not Maine residents. Since the entry of the judgment by default on February 14, 1995, Respondent East Dayton Tool & Die Co. dissolved. Accordingly, the prerequisites for the United States District Court to exercise jurisdiction over this case under the principles of diversity jurisdiction were met.

The basis for jurisdiction in the First Circuit Court of Appeals was found in 28 U.S.C. § 1291 which authorizes the Court of Appeals to hear appeals from all final decisions of the United States District Court. The decision of the United States District Court for the District of Maine in this case became final on February 14, 1995. The Petitioner filed a Motion for Summary Judgment that was denied on May 20, 1994. Subsequently, Respondent Hawker Dayton Corporation filed a Motion for Summary Judgment which was granted on December 23, 1994. At the time the court rendered its decision on the Motion for Summary Judgment, claims were still pending against the Respondent East Dayton Tool & Die Co. On February 14, 1995, those claims were resolved when judgment was entered against Respondent East Dayton Tool & Die Co., by default. As all issues concerning all Respondents were finalized on February 14, 1995, final judgment was entered on that date. Petitioner timely and properly filed his Notice of Appeal to the First Circuit Court of Appeals on February 21, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COURTS SHOULD RECOGNIZE SUCCESSOR CORPORATE LIABILITY IN THE AREA OF PRODUCTS LIABILITY LITIGATION WHEN PRODUCTS ARE TRANSFERRED THROUGH INTERSTATE COMMERCE.

The Court should grant rehearing in this case so that the decision of the First Circuit Court of Appeals can be reviewed for consistency with its decisions in other cases, in particular, the case of *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974), and with the cases of other jurisdictions on the issue of successor corporate liability. This issue is of national importance due to interstate commerce. Remedies in states that apply the doctrine of

successor corporate liability are not available in others, even though damage is by the same product. The Court's decision in this case does not overrule or reject the *B. Offen* case but it also does not follow it. The doctrine of *stare decisis* is one of long standing application in the jurisprudence of the courts in this Country. It provides one with knowledge as to the status of the law. With the First Circuit's decision in this case, that knowledge is erased. Petitioner is now faced with contradictory opinions from the First Circuit on the same issue. Compliance will be difficult because there is now authority that favors both positions from the same court. This is what the doctrine of *stare decisis* is designed to prevent. Therefore, a review by this Court must be held to reverse this new, contradictory statement of the law and give the effect of *stare decisis* to the *B. Offen* case.

II.

THERE IS AN INDEPENDENT TORT OF FAILURE TO WARN BY A SUCCESSOR CORPORATION, WHEN RECEIVING KNOWLEDGE OF THE DEFECT, RECOGNIZED IN FEDERAL COURTS FOR PRODUCTS TRANSFERRED IN INTERSTATE COMMERCE WHEN THE SUCCESSOR CORPORATION CONTINUES TO ACTIVELY SERVICE AND TRANSACT THE SAME BUSINESS WITH THE SAME CUSTOMERS OF ITS PREDECESSOR CORPORATION WHICH MANUFACTURED THE PRODUCT.

The court failed to consider Petitioner's claim that the Motion to Amend should have been granted to more specifically allege Respondent Hawker Dayton's failure to warn Petitioner of the dangers of the machine. In the Complaint, Petitioner alleged Respondent, Hawker Dayton, failed to warn Petitioner of the dangers of the doweling machine. Yet when Petitioner tried to sharpen the claim due to information received in discovery by

amending the Complaint, the District Court denied the motion because it was outside the time set by the scheduling order. The denial of the Motion to Amend was improper.

Under Maine law, a product may be defective, even if faultlessly made, if it is "unreasonably dangerous to place the product in the hands of a user without suitable warning and the product is supplied without such warning." 14 M.R.S.A. § 221; *Walker v. General Electric Co.*, 968 F.2d 116, 119 (1st Cir. 1992) (citing *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 196 (Me. 1990); *Sullivan v. Young Brothers & Company, Inc.*, __F. Supp__, No. 93-271 P C (D.C. Me. July 26, 1995); *Bouchard v. American Orthodontics*, 661 A.2d 1143 (Dec. No. 7347 Me. July 20, 1995).

A duty to warn arises when the manufacturer knows or should know of a danger that is sufficiently serious to require a warning. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 674-75 (Me. 1993). *See also Bouchard v. American Orthodontics, supra*. The broad language of this duty indicates the duty may arise after the sale of the product in question. In fact, the courts of other jurisdictions have specifically held the duty to warn extends beyond the sale. *Smith v. Selco Products, Inc.*, 385 S.E. 2d 173 (N.C. App. 1989); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W. 2d 826 (Minn. 1988). The Eighth Circuit has followed suit. In *Novak v. Navistar International Transportation Corporation*, 46 F.3d 844 (8th Cir. 1995), the court held that a manufacturer has a post sale duty to warn customers/users of the potential dangers from using the original mechanism and the need to re-adjust it.

In the case at bar, the discovery revealed the Respondent Hawker Dayton Corporation did know of a danger sufficiently serious to require a warning with respect to the doweling machines it manufactured following the same design of Hawker Manufacturing Company, a division of East Dayton Tool & Die Co. In his deposition, William Darrow testified as to changes

made in the design of the doweling machine in order to make it safer. They evidently did this at the request of their insurance company. Respondent Hawker Dayton Corporation also made changes in the warnings that were given to purchasers and users of the machine. The changes in design and warnings would have been relevant and admissible under the First Circuit's recent ruling in *Espeaignnette v. Gene Tierney Co., Inc.*, 43 F.3d 1 (1st Cir. 1994). To be consistent with this case, the First Circuit should have allowed Petitioner to amend his complaint with respect to the warnings. Since *Espeaignnette* was decided after the denial of the motion to amend by the district court, the review thereof by the First Circuit should be considered and allowed.

Even without the amendment, Petitioner stated a failure to warn claim in his original complaint which is adequate and proper to go to trial. This would be an action to impose direct liability upon the Respondent Hawker Dayton Corporation, d/b/a Hawker Manufacturing Company, thereby making dismissal of Hawker Dayton Corporation through the summary judgment process improper.

In *Sullivan*, Judge Carter of the United States District Court for the District of Maine reviewed the requirements for a failure to warn claim and negligence in product liability cases. *Sullivan*, *supra* at 14-16. This recent case, citing Maine law, requires close scrutiny by this Honorable Court to maintain uniformity of decisions. *See also Bouchard v. American Orthodontics, et al*, 661 A.2d 1143 (Me. 1995) (discussing failure to warn in products liability cases in Maine). The issue becomes one of duty. Did Respondent Hawker Dayton Corporation, d/b/a Hawker Manufacturing Company, owe a duty to warn customers of Hawker Manufacturing Company, a division of East Dayton Tool & Die Co., of defects once it learned of them. It must be noted and remembered that Respondent Hawker Dayton Corporation used the same designs and had the customer lists of Hawker

Manufacturing. The Respondent further maintained contact with the customers and serviced their machines, even though not specifically manufactured by Hawker Dayton Corporation d/b/a Hawker Mfg. Co. Here, Banton, Inc., Petitioner's employer, was an ongoing customer of Hawker Dayton from East Dayton's original sale. Under these circumstances, the broad language of *Pottle* would apply to impose an independent duty on Respondent Hawker Dayton Corporation d/b/a Hawker Mfg. Co. to warn of defects. Therefore, Petitioner should have been allowed to proceed, at least on that theory against Hawker Dayton. With an independent duty on Respondent Hawker Dayton and breach thereof proximately causing Petitioner's injuries, the court's decision on the Respondent's Motion for Summary Judgment would have been improper. Judge Carter recently discussed the failure to warn doctrine and negligence in *Sullivan v. Young Brothers and Company, Inc.*, __ F. Supp. __ (D.C. Me. July 26, 1995) (Decision No. 93-271 D.C.).

If the Court continues to conclude there is no successor liability, at least the Petitioner should be allowed to proceed with his failure to warn claim, as it is presently pled in his complaint. He, of course, believes that successor liability should be allowed.

III.

A CORPORATE DIVISION, TRANSFERRED FROM ONE CORPORATION TO ANOTHER, IS THE SAME ENTITY FOR PURPOSES OF PRODUCT LIABILITY LITIGATION AND THUS NO ACTUAL SUCCESSOR CORPORATION.

The Maine Supreme Court accepted the corporate opportunity doctrine on July 20, 1995.

The Supreme Judicial Court of Maine has recently approved the use of the "corporate opportunity doctrine", *Northeast*

Harbor Gold Club, Inc. v. Harris, 661 A.2d 1146 (Me. July 20, 1995). In *Harris,* the court stated that a corporate executive cannot obtain an advantage to the detriment of the corporation. Here, Harmon Darrow, husband of stockholder Dorothy Darrow and President of Hawker Manufacturing Co., division of East Dayton Tool & Die Company, brokered a sale of Hawker Manufacturing Division to his new company Hawker Dayton, Inc. The Hawker Manufacturing Co. was sold with its name, assets, customers, productions design, including the same place of manufacture and employees. Harmon Darrow, as president of the new company, carried on the Hawker Manufacturing Co. business. Hawker Manufacturing Co. d/b/a Hawker Dayton, Inc., continues to do business today with the Darrow's son, William Darrow, as its president. East Dayton Tool & Die Company went defunct within two years of the sale of its Hawker Manufacturing Co., division to Hawker Dayton, Inc. The question is, under the corporate opportunity doctrine, did Mr. Darrow perpetrate an improper act on East Dayton. By selling its only viable asset, Hawker Manufacturing Co., East Dayton became a hollow shell. Petitioner cannot collect his $2.3 million judgment against East Dayton. Thus, if under the newly recognized corporate opportunity doctrine, Maine law determines some impropriety occurred, then there would be successor liability. A remand is in order on this critical issue.

IV.

IT IS THE POLICY OF THE FEDERAL COURTS TO PERMIT A MANUFACTURER TO SPIN OFF ITS DIVISION TO A NEW MANUFACTURER TO AVOID LIABILITY FOR PRODUCT DEFECTS.

Is *Hawker Manufacturing Company* the proper Respondent? The court has not answered Petitioner's point that we are not facing successor corporate liability at all. Rather, Hawker Manufacturing Company (Hawker Mfg. Co.) is the same entity

with its own name (recognized by Ohio Secretary of State) used on the product involved, on the building, on the stationery, on the machine equipment and used as its corporate name. The transfer from the Darrows from East Dayton to Hawker Dayton of Hawker Mfg. Co. is as shallow a one as the Court will witness. It was a turnkey transfer, involving the same people, product, place, and customers. The Petitioner asserts, in this case we do not have a successor in fact. Rather, we have Hawker Mfg. Co. continuing on today as it did 25 years ago.

V.

THE CORPORATE OPPORTUNITY DOCTRINE RECENTLY ADOPTED BY THE MAINE SUPREME JUDICIAL COURT DOES HAVE APPLICATION.

In addition to the cases and doctrines asserted, the Petitioner believes an important policy question is involved: If the court's decision is permitted to stand, then every product manufacturer in this circuit will place its products into a division of the corporation, spin off the division to a newly formed company with the same officers, owners, product, employees, place of manufacture, and customers, cause the prior company to go defunct without insurance and they will be free of liability for defects in the product. Further, if the new company learns of defects after the transfer, that is permissible, since they will not be held to answer for a failure to warn these same customers they continue to service of the defect. Such a result should be intolerable to this Honorable Court.

VI.

THE COURT DID ERR IN DECLINING TO CERTIFY THE QUESTION OF SUCCESSOR CORPORATE LIABILITY TO THE MAINE SUPREME JUDICIAL COURT.

The Court of Appeals may certify a state law question to the state supreme court. As noted by this Honorable Supreme Court, that path is open to itself and to any court of appeals of the United States. *Lehman Brothers v. Schein,* 416 U.S. 386, 390, 94 S. Ct. 1741, 1743, 40 L. Ed. 2d 215 (1974). The First Circuit Court of Appeals has, itself, certified questions to the Maine Supreme Judicial Court. *Hiram Ricker & Sons v. Student Int. Meditation Soc.,* 501 F.2d 550 (1st Cir. 1974). Maine has adopted procedures for certification of questions by the federal courts. Me. R. Civ. P. 76B.

In *Lehman Brothers,* the United States Supreme Court noted that while not obligatory, certification in certain cases was entirely appropriate. In *Lehman Brothers,* the issue concerned a novel question in an unsettled area of law. The Supreme Court remanded the case for certification.

As in *Lehman Brothers,* the case at bar involves a novel question of law — the applicability of the theory of successor corporate liability in the field of products liability litigation. As the Court seemed hesitant to address the issue and mentioned Petitioner's failure to bring the case in Maine courts, certification is appropriate. Otherwise, the Court appears to be punishing Petitioner for exercising his right under 28 U.S.C. § 1332 to bring his case in federal court when there is diversity jurisdiction. The Court has the authority to certify questions on its own; however, to the extent a formal request is required, certification is hereby requested. The certified question should ask whether Maine law

recognizes the theory of successor corporate liability in products liability litigation.

CONCLUSION

For the foregoing reasons, the Petitioner prays his Petition for Writ of Certiorari be granted.

Respectfully submitted,

N. LAURENCE WILLEY, JR.
Counsel of Record
LAURIE ANNE MILLER
FERRIS, DEARBORN & WILLEY
Attorneys for Petitioner
120 North Main Street
P.O. Box 609
Brewer, Maine 04412
(207) 989-3366

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED AUGUST 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1181

RANDY JORDAN,

Plaintiff, Appellant,

v.

HAWKER DAYTON CORPORATION AND EAST DAYTON TOOL & DYE COMPANY,

Defendants, Appellees.

ORDER OF THE COURT
Before: Torruella, Chief Judge,
Selya, Cyr, Boudin, Stahl & Lynch, Circuit Judges.

Entered: August 29, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

Appendix A

By The Court

FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO, Clerk

cc: Messrs. Willey, Jr., King, Singer & Ms. Darrow & Ms. Miller

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 10, 1995

Randy JORDAN,

Plaintiff, Appellant,

v.

HAWKER DAYTON CORPORATION and East Dayton Tool & Die Co.,

Defendants, Appellees.

No. 95-1181.

United States Court of Appeals,
First Circuit

Heard Aug. 3, 1995.

Decided Aug. 10, 1995.

* * *

Laurie Ann Miller, with whom N. Laurence Willey, Jr. and Ferris, Dearborn & Willey, Brewer, ME, were on brief, for appellant.

Brent A. Spinger, with whom David C. King and Rudman & Winchell, Bangor, ME, were on brief, for appellee Hawker Dayton Corp.

Appendix B

Before CYR, BOUDIN, and LYNCH, Circuit Judges.

LYNCH, Circuit Judge.

Randy Jordan, an injured worker, appeals, asking us to revisit the law of Maine on successor liability so that he may reach the Hawker Dayton Corporation, which purchased the assets of a division of another company that had manufactured the machinery which injured Jordan's hand. Sitting as a court in diversity jurisdiction under *Eric Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we decline to do so and affirm the grant of summary judgment issued in favor of Hawker Dayton Corporation by the district court.

FACTS

In September 1991, the appellant, Randy Jordan, badly injured his hand at work while attempting to unjam a doweling machine. Jordan underwent medical and psychological treatment, and filed this products liability action in the United States District Court for Maine against "Hawker Dayton Manufacturing Company."

The doweling machine was manufactured in 1973 by Hawker Manufacturing Company ("Hawker Manufacturing"), a division of East Dayton Tool & Die Co. ("East Dayton") East Dayton also manufactured automobile components and other products. Around the time that the doweling machine was manufactured, Dorothy Darrow, the sole shareholder of East Dayton, sold some of her stock to family friends, and East Dayton redeemed her remaining stock for cash and an installment note. The company continued its manufacturing operations and even added additional product lines.

Appendix B

In August 1973, East Dayton sold to Harmon Darrow, the president of Hawker Manufacturing, an option to purchase the assets of Hawker Manufacturing at their net book value. In March 1974 Mr. Darrow formed Hawker Dayton Corporation ("Hawker Dayton"), conveyed his option to that company, and in July 1974, Hawker Dayton exercised the option and purchased the Hawker Manufacturing assets for approximately $150,000. Hawker Dayton continued the operations of Hawker Manufacturing trade name. East Dayton continued to manufacture wood-working machines (including doweling machines at first), automobile dies and other specialized machinery for about two years.

In 1976, East Dayton defaulted on its note to Ms. Darrow. It then sold the rest of its equipment for $925,000 and its real property for $650,000 to entities not involved in this lawsuit, and made payments out to Ms. Darrow on the installment note for the next ten years.

PROCEEDINGS BELOW

On June 14, 1993, Jordan filed this suit. In August, the district court issued a scheduling order giving a deadline of September 15, 1993, for amendment of the pleadings. The judge later amended the scheduling order, extending the deadline for amending pleadings by fifteen days and extending the discovery deadline by two months. During discovery, Jordan learned, *inter alia*, that East Dayton was the manufacturer of the doweling machine. On February 10, 1994, five days before discovery was to be completed under the scheduling order, Jordan moved to correct the corporate name of the defendants from "Hawker Dayton Manufacturing Corporation" to "Hawker Dayton Corporation," to add East Dayton as a defendant and to include additional theories of liability against Hawker Dayton. The

district court granted the motion to correct the corporate name of the defendant and to add East Dayton, but denied the motion to add additional theories of liability.

Jordan filed a motion for summary judgment on the issue of whether Hawker Dayton was liable as a successor corporation for the debts and liabilities of East Dayton. Hawker Dayton objected, and in its response asked that summary judgment be entered in its favor instead. The Magistrate Judge recommended that Jordan's motion be denied, and the district court adopted the recommendation. Neither ruled on the issue of whether summary judgment should be entered on behalf of Hawker Dayton. Hawker Dayton subsequently moved for summary judgment, and the district court granted the motion.

Judgment by default was entered against East Dayton, after a hearing on damages, for $2,230,088.21.

Jordan appeals the grant of summary judgment in favor of Hawker Dayton on the issue of successor liability.

DISCUSSION

Four years ago, albeit in a different context than a tort suit, the Supreme Judicial Court of Maine held, as to corporate successor liability: "[A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Director of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734, 736 (Me.1991). *Diamond Brands* involved interpretation of the term "employer" in a severance pay

statute. Conceding that there is no contrary agreement by the asset purchase parties and no statutory exception to common law here, Jordan tries to avoid the *Diamond Brands* holding by arguing the opinion does not foreshadow what the Maine Court would do in a tort action.

There are two responses. First, the rule, as stated above, that a mere asset purchase will not give rise to successor liability is articulated by Maine's highest court as being "the established common law rule." That alone defeats Jordan's claim, as he has argued that Maine law applies. This common law rule is reinforced by the social policy judgment made by the Maine legislature, in the statute at issue in *Diamond Brands*. Maine there decided that it is benefited by not discouraging purchases of assets of Maine businesses through imposition of successor liability on purchasing corporations, thus keeping businesses going which would otherwise fail, and so continuing to have employees benefit from their continued employment. *Id.* at 737 n. 7. Jordan points to no legal developments in the law of successor liability in Maine or in any other jurisdiction since *Diamond Brands* to suggest that the Supreme Judicial Court would change this law. *See Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205, 76 S.Ct. 273, 277, 100 L.Ed. 199 (1956) ("[T]here appears to be no confusion in the [Maine] decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of [Maine] judges on the question, no legislative development that promises to undermine the judicial rule.") Thus, *Diamond Brands* is the law of Maine, and this Court must apply that law.

Secondly, plaintiff chose a federal, rather than a state forum, presumably cognizant of this court's statement that "litigants who reject a state forum in order to bring suit in federal court

under diversity jurisdiction cannot expect that new trails will be blazed." *Ryan v. Royal Insurance Company of America*, 916 F.2d 731, 744 (1st Cir. 1990). Jordan did not file a motion that the issue be certified to the state court. Here Jordan has suffered an injury and East Dayton appears to no longer have assets with which to satisfy his claim. But the complex policy arguments as to whether the common law should strive to assure him recompense are left to the state, not the federal court, to decide. Here Maine has made that calculus and given the greater weight to the protection of jobs through limits on successor liability. It is not the role of the federal courts to "question the policy choices of states whose law we apply." *Krauss v. Manhattan Life Insurance Company of New York*, 643 F.2d 98, 102 (2d Cir. 1981).

Jordan argues that the Supreme Judicial Court recently adopted a "majority rule" in another aspect of tort law and so will adopt the majority rule as to successor liability. Jordan relies on *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267, 270 (Me.1995), which held that a plaintiff did not state a claim in tort for a defective product's damage to itself, thus having Maine join that rule adopted by a majority of jurisdictions. Even were we incorrect in our understanding that the law of Maine on successor liability has been determined by its highest authority, this argument would not assist Jordan. The *Peachtree Doors* decision does not expand plaintiffs' remedies, but reflects a rejection of such an expansion. More tellingly, even if Maine were to adopt a "majority rule" as to successor liability, Jordan would still not prevail. Assuming the majority rule to be that a corporation which purchases assets from another is not liable in tort for the actions of the transferor unless one of four exceptions is met, *see, e.g.*, 1 *American Law of Products Liability* § 7:1 at 10-11 (3d ed. 1990), those exceptions avail Jordan naught. *See also Ohio Bureau of Workers' Compensation v. Widenmeyer Electric Co.*, 72 Ohio App. 3d 100,

593 N.E.2d 468, 470 (1991); *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 340, 431 A.2d 811, 815 (1981); *Ray v. Alad Corp.*, 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 578, 560 P.2d 3, 7 (1977). There was no agreement by Hawker Dayton, express or implied, to assume the liabilities of East Dayton Tool and Die Co., and Jordan does not claim that the asset sale was fraudulent, not made in good faith, or made without sufficient consideration. There was no de facto merger nor a mere continuation of the predecessor here where the transferor corporation, East Dayton, neither dissolved nor liquidated after the asset sale. *See, e.g.*, 1 *American Law of Products Liability, supra*, §§ 7:10, 7:12, 7:14 & 7:15 (both merger or consolidation and mere continuation exceptions require that there be only one corporation at the end of the transaction). Indeed East Dayton sold less than 10% of its assets to Hawker Dayton, continued to do business thereafter and paid out on an installment note for twelve years after the asset sale.

Jordan's argument ultimately is that the product line doctrine of successor liability should be adopted. Under the product line doctrine, a corporation that purchases all or substantially all of the assets of another corporation, continues the manufacturing operations and sells the same product line may be strictly liable for injuries caused by defective products in that line. *See, e.g.* 1 *American Law of Products Liability, supra*, § 7:25 at 42; *see also Ray*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3; *Ramirez*, 86 N.J. 832, 431 A.2d 811 (1981); *Dawejko v. Jorgensen Steel Company*, 290 Pa.Super. 15, 434 A.2d 106 (1981); *Martin v. Abbott Laboratories*, 102 Wash.2d 581, 689 P.2d 868 (1984). It is far from clear the product line doctrine would assist Jordan. *See, e.g., Ray*, 19 Cal.3d at 31, 136 Cal.Rptr. at 580, 560 P.2d at 9; *Ramirez*, 86 N.J. at 358, 431 A.2d at 825 (the product line exception requires that the asset purchase destroy the plaintiff's remedy, for example, because all of the assets are purchased or because the

purchase agreement requires the predecessor to liquidate). This doctrine is at most a minority rule which has plainly not been adopted by Maine.

Finally, Jordan makes a procedural argument that the court was precluded from entering summary judgment for Hawker Dayton because it failed to do so when Hawker Dayton had countered his motion in part by saying that it, not Jordan, was entitled to entry of judgment. The court originally denied Jordan's motion and took no action on Hawker Dayton's counter request. When Hawker Dayton later filed a formal motion for summary judgment in its favor, the court granted it, saying it had not considered the merits of Hawker Dayton's request when it denied Jordan's motion. There was no error in this procedure and would have been none even if the court had considered the counter request the first time around. *See Burns v. Massachusetts Institute of Technology*, 894 F.2d 416, 418 (1st Cir. 1968). Nor was there an abuse of discretion in denying Jordan's motion to amend his complaint filed more than four months after the deadline set in the scheduling order and only a few days before discovery was to be completed.

The decision of the district court granting summary judgment to Hawker Dayton is affirmed.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED FEBRUARY 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civ No. 93-O 144-B

RANDY JORDAN,

Plaintiff,

v.

HAWKER DAYTON CORPORATION,

and

EAST DAYTON TOOL & DIE COMPANY,

Defendants.

ORDER GRANTING JUDGMENT BY DEFAULT

BRODY, District Judge

On January 30, 1995, this Court entered default upon Plaintiff's Motion for Entry of Default against Defendant East Dayton Tool and Die Company. Subsequently, this Court heard Plaintiff at a hearing on damages. The Court has considered Plaintiff's arguments and documents submitted, and now finds as follows:

Appendix C

1. Counsel for the Defendant, East Dayton Tool & Die Company, withdrew in this matter and Defendant did not subsequently participate in this action and defend against Plaintiff's claims.

2. Plaintiff's Motion for Entry of Default has been granted by a Clerk of the Court pursuant to law.

3. Plaintiff's factual submissions have been reviewed and considered.

IT IS NOW, THEREFORE, ORDERED that judgment shall be entered in favor of Plaintiff Randy Jordan and against the Defendant East Dayton Tool & Die Company pursuant to M.R.S.A. § 221, for: past medical bills totalling $104,088.21; past lost wages totalling $26,000.00; and future medical bills, future lost wages expenses, interest, pain, suffering, permanent impairment, and hedonic damages totaling $2,100,000; the sum of which equals $2,230,088.21.

The Clerk of the Court shall forthwith enter final judgment in accordance herewith.

SO ORDERED.

s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 14th day of February, 1995.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED DECEMBER 23, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL 93-0144-B

RANDY JORDAN,

Plaintiff

vs.

HAWKER DAYTON CORPORTATION, et al

Defendants

ORDER ACCEPTING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court on November 30, 1994, with copies to counsel, his Recommended Decision. Plaintiff filed his Objections to the Recommended Decision and defendant has responded to those objections. I have reviewed and considered the Magistrate Judge's Recommendation, together with the entire record and have made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendation of the United States Magistrate Judge for the reasons set forth in his Recommendation, and determine that no further proceeding is necessary.

Appendix D

It is therefore ORDERED as follows:

(1) the Recommendation of the Magistrate Judge is hereby AFFIRMED;

(2) defendant's motion for Summary judgment is GRANTED and plaintiff's cross motion for summary judgment is DENIED.

Dated at Bangor, Maine this 23rd day of December, 1994.

s/ Morton A. Brody
Morton A. Brody
United States District Judge

APPENDIX E — RECOMMENDED DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED NOVEMBER 30, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 93-0144-B

RANDY JORDAN,

Plaintiff

v.

HAWKER DAYTON CORPORATION, et al.,

Defendants

RECOMMENDED DECISION

Defendant Hawker Dayton Corporation ["HAWKER DAYTON"] moves for summary judgment in the above-entitled action on the grounds that it is not liable as a successor corporation to Defendant East Dayton Tool & Die Co. ["EAST DAYTON"].[1] Plaintiff has responded to the Motion in accordance with Local Rule 19, and has requested judgment be entered in favor of Plaintiff on the materials presented.

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1. Counsel for East Dayton has been permitted to withdraw from this matter, and East Dayton has been notified first, that it may not appear in this action without benefit of counsel, and second, that it will nevertheless be subject to any and all orders and rulings entered by this Court. East Dayton has not responded to this Motion for Summary Judgment.

Appendix E

Background

Plaintiff was injured in 1991 while working with a dowel machine manufactured in 1973 by Defendant East Dayton's Hawker Manufacturing Division. Defendant Hawker Dayton purchased the Hawker Manufacturing Division from East Dayton in 1974. East Dayton ceased operations in 1976.

The successor liability issue which is the subject of this Motion for Summary Judgment first reared its head in the context of Plaintiff's Motion for Summary Judgment, filed March 1, 1994. In Defendant's response to the Motion, Defendant sought judgment in its favor. The Court inadvertently failed to address the cross-motion, however, and summary judgment was simply denied in favor of Plaintiff.[2]

Choice of Law

In the Recommended Decision on Plaintiff's Motion for Summary Judgment, the Court found it unnecessary to resolve the issue regarding which state's law would apply to this action. The parties now appear to agree that Maine law applies. Plaintiff's argument, however, is that the Supreme Judicial Court of Maine would adopt, if presented with the opportunity, the various exceptions to the rule regarding successor corporate liability under which Plaintiff seeks to hold Defendant liable in

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2. Plaintiff nevertheless argues that the Court's finding that genuine issues of material fact precluded summary judgment in the context of that motion is the law of the case, precluding summary judgment in Defendant's favor in the context of this motion. The argument is without merit. Rather, any findings of fact made by the Court for purposes of that motion will be accepted as law of the case here. To the extent those findings of fact support judgment in favor of either party, judgment may be entered.

this case. Specifically, he argues that Law Court's decision in *Director of Bur. of Labor v. Diamond Brands*, 588 A.2d 734 (Me. 1991) cannot be read as a rejection of those theories.

In the Court's earlier Recommended Decision, we stated:

> Defendant correctly argues that the State of Maine has not adopted the exceptions on which Plaintiff seeks to impose liability. Further, we find evidence that the Law Court would not be so inclined. In Maine, the general rule is that, "absent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide* arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Director of Bur. of Labor v. Diamond Brands*, 588 A.2d 734, 736 (Me. 1991) (citations omitted). The Law Court stated in a footnote:
>
> > Although the plaintiffs argue that Diamond Brands was a *mere continuation* of Diamond Match, they generated no genuine issue of material fact regarding the nature of the asset purchase between the two corporations. In granting the summary judgment in favor of Diamond Brands, the [lower] court implicitly determined, based on the plaintiffs' failure to produce evidence that the

> transaction was undertaken for an improper purpose or with ... fraudulent intent ... , that the two companies were distinct corporate entities. *See Brennan v. Saco Constr. Inc.*, 381 A.2d 656, 662 (Me. 1978) (absent fraud, misrepresentation, or intent to circumvent overriding public policy, court reluctant to disregard corporate form).

Id. at 736, n.5 (emphasis added). As we read this statement, the Maine Law Court does not appear as willing to be swayed from its general rule as might the other jurisdictions upon which Plaintiff relies.

Rec. Dec. at 4 (Apr. 6, 1994). In *Diamond Brands*, the Law Court concerned itself with the question whether there was an "explicit statutory provision," which may have led Plaintiff to view *Diamond Brands* as making a narrow statement on successor corporate liability in Title 26 severance pay cases. In our view, when presented with the "mere continuation" exception that Plaintiff is here propounding, the Law Court held steady with the rule that "absent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Diamond Brands*, 588 A.2d at 736. *See, also Saco River Tel. & Tel. v. Shooshan & Jackson*, 826 F. Supp. 580, 582 (D. Me. 1993) ("Unfortunately for the plaintiffs, Maine law does not appear to recognize [the de facto merger and continuity of enterprise] exceptions to the common law rule").

Appendix E

Discussion

Plaintiff has presented the following factual scenario in support of its argument in opposition to Defendant's Motion for Summary Judgment:

In 1973, Hawker Manufacturing was a division of Defendant East Dayton Tool & Die Co. East Dayton manufactured car doors, trunks, and panels, among other things. The Hawker manufacturing division manufactured woodworking machines, including doweling machines, one of which was sold to Plaintiff's employer in 1973.

In August, 1973, East Dayton conveyed to Harmon Darrow, once a Vice President of East Dayton, an option to purchase the Asset of East Dayton. In 1974, Harmon Darrow formed Defendant Hawker Dayton Corporation, and assigned his option to Hawker Dayton. Hawker Dayton thereafter purchased the assets, inventory, and trade name of Hawker Manufacturing from East Dayton. Hawker Dayton continued to manufacture the Model 3000 doweling machines, like the one sold to Plaintiff's employer, after 1974. In addition, it continued to service the machines previously sold by Hawker Manufacturing.

Several members of the Darrow family were, and are, involved with both East Dayton and Hawker Dayton in various capacities. Harmon Darrow's wife is the sole director and sharehold of East Dayton, which is now defunct. His son is the President of Hawker Dayton. His father, or father-in-law, founded East Dayton Tool & Die Co.

Plaintiff argues that there are policy reasons favoring the Court's adoption of the exceptions to the law in this state that

Appendix E

"absent a contrary agreement by the parites, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Diamond Brands*, 588 A.2d at 736. He does not argue that these facts in any way evidence that the transfer of Hawker Manufacturing to Hawker Dayton was not a *bona fide*, arm's-length transaction."[3] Nor is there any suggestion that Hawker Dayton contractually assumed Hawker Manufacturing's liabilities, or that there is a relevant statutory provision. On the basis of the facts, as presented by Plaintiff, the Court must conclude that under Maine Law Defendant Hawker Dayton may not be held liable for the debts and liabilities of the Hawker Manufacturing Company.

Conclusion

Accordingly, I recommend that the Court GRANT Defendant's Motion for Summary Judgment, and DENY Plaintiff's cross-motion for Summary Judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's

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3. The mere fact that family members were involved on both ends of the transaction is not sufficient to cast suspicion on the transaction. "Arm's-length" is merely the standard against which a transaction is gauged; if the terms of the transaction are similar to those that would have been negotiated between unrelated individuals operating in their own best interest, the transaction is considered to have been made at "arm's-length." Black's Law Dictionary 109 (6th ed. 1990). There is no suggestion in this record that, for example, the price paid for Hawker Manufacturing was too low, or that the parties had improper motive for the transfer.

report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on November 30, 1994.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED MAY 20, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL NO: 93-0144-B

RANDY JORDAN,

Plaintiff

v.

HAWKER DAYTON MANUFACTURING CO., et al.,

Defendants

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court on April 6, 1994, with copies to counsel, his Recommended Decision. Defendant Hawker Dayton Manufacturing Co. filed its Objections to the Recommended Decision on April 8, 1994 and Plaintiff also filed his Objections on April 8, 1994. I have reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, and determine that no further proceeding is necessary.

Appendix F

1. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge is hereby ADOPTED.

2. It is further ORDERED that Plaintiff's Motion for Summary Judgment is DENIED.

Dated at Bangor, Maine this 20th day of May, 1994.

s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

APPENDIX G — RECOMMENDED DECISION OF THE UNITED STATES DISTRICT COURT FOR DISTRICT OF MAINE FILED APRIL 6, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 93-0144-B

RANDY JORDAN,

Plaintiff

v.

HAWKER DAYTON MANUFACTURING CO., et al.,

Defendants

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff filed this Motion for Summary Judgment on March 1, 1994. In it, he seeks judgment on the sole issue of whether defendant Hawker Dayton Manufacturing Co. ["Hawker Dayton"] may be held liable for his injuries as a successor corporation.[1] We note at the outset that Plaintiff's Motion fails to comply with the provisions of Local Rule 19, in that there is no separate "short and concise statement of material facts." D. Me. R. 19(b)(1). Insofar as the issue raised is particularly appropriate

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1. Hawker Dayton Manufacturing Company purchased the assets of Hawker Manufacturing Company from the East Dayton Tool & Die Company in 1976. East Dayton Tool & Die manufactured the machine which is the subject of this lawsuit prior to the transfer, and is also a Defendant in this action.

for pre-trial resolution, we nevertheless determine that the Motion should be addressed on its merits.

In support of his Motion for Summary Judgment, Plaintiff cites a First Circuit case arising out of New Hampshire for the proposition that there are exceptions to the general rule that a corporation is not liable for the debts and liabilities of the corporation from which it purchased assets. Defendant argues in response that Maine law applies to this action, and no such exceptions have been adopted in Maine. We have not requested that Plaintiff reply on the choice of law question, *see* Local Rule 19(d), in light of our conclusion that Plaintiff would not be entitled to summary judgment under either scenario.

Discussion

I. The Exceptions to the Rule.

Plaintiff cites the law of other jurisdictions for the proposition that Hawker Dayton may be liable for his injuries as a successor corporation. Specifically, he argues that Hawker Dayton is either a continuation of Defendant East Dayton Tool & Die Co. ["East Dayton"], or there was a de-facto merger of the two corporations. Motion at 29-30 (citing *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974) (applying New Hampshire law)).

These same two exceptions to the general rule that successor corporations are not liable for their predecessor's debts and liabilities were addressed by the First Circuit Court of Appeals after its decision in *Cyr. Dayton v. Peck, Stow and Wilcox Co.*, 739 F.2d 690 (1st Cir. 1984) (applying Massachusetts law). In *Dayton*, the Court articulated three requirements for the "merger" exception to apply, two of which are not present in this case. First,

the Court noted there must be a " 'continuity of shareholders,' which is found where the purchaser corporation exchanges its own stock as consideration for the seller corporation's assets." *Id.* at 693 (citations omitted). Second, the selling corporation must cease operations, liquidate, and dissolve as soon as practicable following the sale. *Id.*

In this case, there is no dispute that East Dayton sold the assets of its Hawker Manufacturing Division to Hawker Dayton for cash, rather than stock. There is no dispute that East Dayton continued to operate for some two years after the sale. There is no dispute that East Dayton is still a corporate entity, though it is no longer in operation, and its assets have been liquidated. The transfer of assets in this case was not a merger for purposes of successor liability.

Regarding the exception for a continuation of the predecessor's business, the Circuit Court noted that " '[t]he key element of a "continuation" is a common identity of the officers, directors and stockholders in the selling and purchasing corporations.' " *Id.* at 693 (quoting *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977)). In this case, the principals of Hawker Dayton were different people than those involved with East Dayton. The mere fact that Hawker Dayton hired a former employee of East Dayton does not turn this into a case where the same principals continued to operate the same business under a different name.

The First Circuit distinguished its holding in *Cyr* not only on its facts, but also by acknowledging that the "*Cyr* decision has been viewed as an 'improvisation' on the theme of the 'mere continuation' exception." *Id.* (citation omitted). In fact, the court's analysis in *Cyr* was later repudiated by the Supreme Court

of New Hampshire. *Simoneau v. South Bend Lathe*, 130 N.H. 466, 543 A.2d 407 (1988).

II. The Maine Rule.

Defendant correctly argues that the State of Maine has not adopted the exceptions on which Plaintiff seeks to impose liability. Further, we find evidence that the Law Court would not be so inclined. In Maine, the general rule is that, "absent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Director of Bur. of Labor v. Diamond Brands*, 588 A.2d 734, 736 (Me. 1991) (citations omitted). The Law Court stated in a footnote:

> Although the plaintiffs argue that Diamond Brands was a *mere continuation* of Diamond Match, they generated no genuine issue of material fact regarding the nature of the asset purchase between the two corporations. In granting the summary judgment in favor of Diamond Brands, the [lower] court implicitly determined, based on the plaintiffs' failure to produce evidence that the transaction was undertaken for an improper purpose or with ... fraudulent intent ... , that the two companies were distinct corporate entities. *See Brennan v. Saco Constr., Inc.*, 381 A.2d 656, 662 (Me. 1978) (absent fraud, misrepresentation, or intent to circumvent overriding public policy, court reluctant to disregard corporation form).

Id. at 736, n.5 (emphasis added). As we read this statement, the Maine Law Court does not appear as willing to be swayed from its general rule as might the other jurisdictions on which Plaintiff relies.

Conclusion

Accordingly, I recommend that the Court DENY Plaintiff's Motion for Summary Judgment on the issue of Hawker Dayton's potential for successor liability.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636 (b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on April 6, 1994.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED MARCH 7, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL NO. 93-0144-B

RANDY JORDAN,

Plaintiff

vs.

HAWKER-DAYTON MANUFACTURING CO.,

Defendant

ORDER

After reviewing Plaintiff's Motion to Amend the Complaint, Plaintiff's Motion to Modify the Scheduling Order, and Plaintiff's Motion to Continue, and after conferring with counsel, the Court hereby ORDERS:

1. That plaintiff's Motion to Amend shall be GRANTED in part and DENIED in part. Plaintiff's complaint shall be amended to replace "Hawker-Dayton Manufacturing Company" with "Hawker Dayton Corporation", the corporate name of the defendant. Plaintiff's complaint shall also be amended to add, as a new party defendant, East Dayton Tool & Die Co. Plaintiff's Motion to Amend the Complaint to raise new claims against Hawker Dayton Corporation is DENIED.

Appendix H

2. That plaintiff's Motion to Continue shall be GRANTED. The action shall be removed from the March 8, 1994 trial list and continued pursuant to the terms of this Order.

3. That plaintiff shall have until April 15, 1994 to serve East Dayton Tool & Die Co. with a summons and complaint, unless a further order by this Court to extend, is granted.

4. That plaintiff's Motion to Modify the Scheduling Order shall be GRANTED pursuant to the terms of this Order. The Court shall issue a new scheduling order after East Dayton Tool & Die Co. has filed a responsive pleading. The Order shall include a requirement that the parties meet within a reasonable time set by the Court to discuss settlement.

5. That the plaintiff's original complaint, including counts for negligence, strict liability in tort and warranty, shall be the causes of action upon which plaintiff will proceed against defendant Hawker Dayton Corporation. The plaintiff may bring whatever causes of Action he so deems appropriate against East Dayton Tool & Die Co. The Court notes that the plaintiff will retain all counts in its original complaint.

Dated: 3/7/94

s/ Morton A. Brody
Morton A. Brody
Judge, United States District Court

Supreme Court, U.S.
FILED
DEC 28 1995
OFFICE OF THE CLERK

No. 95-837

In The

Supreme Court of the United States

October Term, 1995

RANDY JORDAN,

Petitioner,

vs.

HAWKER DAYTON CORPORATION and EAST DAYTON TOOL & DIE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID C. KING
Counsel of Record
BRENT A. SINGER
RUDMAN & WINCHELL
Attorneys for Respondent
Hawker Dayton Corporation
84 Harlow Street
P.O. Box 1401
Bangor, Maine 04402-1401
(207) 947-4501

7999
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

7PP

AMENDED LIST OF ALL PARTIES TO THE PROCEEDING

AND

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Respondent, Hawker Dayton Corporation ("Hawker Dayton") adopts by reference the "List of All Parties to the Proceeding," contained in Mr. Jordan's Petition for a Writ of Certiorari, corrected and supplemented as follows.

The correct corporate name of Hawker Dayton is "Hawker Dayton Corporation." The correct trade name is "The Hawker Manufacturing Company." Hawker Dayton has no parent company nor any subsidiary. Hawker Dayton is not publicly traded.

With respect to the East Dayton Tool & Die Company, Dorothy S. Darrow stated by letter dated March 27, 1995, to the Clerk of the United States Court of Appeals for the First Circuit and other interested parties, that "the East Dayton Tool & Die Company is no longer in business, having been officially dissolved by Certificate of Dissolution filed with the Secretary of the State of Ohio on February 6, 1995, a copy of which is enclosed." The Certificate sent by Ms. Darrow is dated February 6, 1995, by the Secretary of State of Ohio, and it certifies to the filing and recording of "DIS MIS [sic] of THE EAST DAYTON TOOL & DIE COMPANY." The record is otherwise silent on the current legal status of The East Dayton Tool & Die Company.

STATEMENT OF THE CASE

Applying Maine law, the United States District Court, District of Maine (the "District Court"), ruled by summary judgment that Hawker Dayton is not liable as a successor corporation for the torts of East Dayton. The United States Court of Appeals for the First Circuit (the "First Circuit") affirmed in an undivided opinion. *See Jordan v. Hawker Dayton Corp.*, 62 F.3d 29 (1st Cir. 1995).

The relevant and undisputed facts are as follows.

In the spring of 1973, East Dayton Tool & Die Company ("East Dayton") was operating in part under the trade name "The Hawker Manufacturing Company." Under that trade name, it manufactured a dowel machine purchased by, and delivered to, Banton Brothers Inc., in Newport, Maine.

In August of 1973, East Dayton sold to Harmon Darrow for $1,000 a one-year option to purchase certain items of personal property (the "Assets") for their net book value.

The Respondent, Hawker Dayton Corporation ("Hawker Dayton"), was incorporated in Ohio in March of 1974. Harmon Darrow then assigned his one-year option to purchase the Assets to Hawker Dayton.

In July of 1974, Hawker Dayton exercised its option and purchased the Assets from East Dayton for $150,000. At about that time, East Dayton also transferred to Hawker Dayton the use of the trade name "The Hawker Manufacturing Company."

For approximately two years thereafter, East Dayton

continued to manufacture and sell woodworking machines (including, at first, dowel machines), injection molding, automobile dies, and other specialized machinery.

With the Assets it purchased, Hawker Dayton began manufacturing dowel machines. Approximately one-third of the employees of Hawker Dayton were former employees of East Dayton. Most of the employees who manufactured dowel machines for East Dayton did *not* go to work for Hawker Dayton. Hawker Dayton did not manufacture dowel machines by the same processes as East Dayton. No stockholder of Hawker Dayton has ever been a shareholder of East Dayton.

In 1976, East Dayton defaulted on an installment note to a former shareholder named Dorothy Darrow. At Ms. Darrow's request, a new board of directors was elected. East Dayton then sold manufacturing equipment and real property to third parties for a total of $1,575,000. East Dayton resumed payments on its installment note to Ms. Darrow and made payments to her through 1986.

In 1991, the Petitioner, Randy Jordan, severely injured his hand at work in Maine while working on the dowel machine that Banton Brothers Inc. purchased from East Dayton in 1973.

In 1993, Mr. Jordan filed suit against "The Hawker-Dayton Manufacturing Company." Through discovery, Mr. Jordan learned the correct identities of East Dayton and Hawker Dayton, and that East Dayton had manufactured the dowel machine. Mr. Jordan amended his Complaint to add East Dayton as a defendant. The Amended Complaint alleges that (1) East Dayton negligently manufactured the dowel machine, (2) East Dayton is strictly liable to Mr. Jordan because the dowel machine as sold was defective or unreasonably dangerous, and (3) Hawker Dayton is liable as a successor corporation for the torts of East Dayton.

The District Court ruled by summary judgment that Hawker Dayton is not liable under Maine law as a successor corporation for the torts of East Dayton. The District Court entered judgment by default against East Dayton in the amount of $2,230,088.21. Mr. Jordan appealed the summary judgment in favor of Hawker Dayton. The First Circuit affirmed.

REASONS FOR DENYING THE WRIT

This is a diversity jurisdiction case applying Maine's common-law of successor corporate liability in the context of strict products liability and negligence claims. No issue of federal law is at stake, much less any conflict among the Circuits of the United States Court of Appeals. Indeed, the only conflict alluded to by Mr. Jordan in his petition is a supposed conflict between the First Circuit's holding in this case and its holding in *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974). *Cyr*, however, applied New Hampshire law, and was itself later repudiated by the New Hampshire Supreme Court in *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 543 A.2d 407, 409 (1988).

Nor is there any unsettled issue of Maine law. The Maine Supreme Judicial Court has stated that the "general" and "established" common law rule is that "absent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's length transaction is not liable for the debts or liabilities of the transferor corporation." *Director of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734, 736, 737 (Me. 1991).

Mr. Jordan has never argued that Hawker Dayton expressly or impliedly agreed to be liable for the torts of East Dayton. Mr. Jordan has never argued that any statutory provision makes Hawker Dayton liable for the torts of East Dayton. Mr. Jordan has

never argued that Hawker Dayton purchased the Assets in bad faith or other than at arm's length for $150,000. Consequently, the District Court granted Hawker Dayton's motion for summary judgment, and the First Circuit properly affirmed.

Mr. Jordan now petitions this Court, asking it to consider the adoption of a federal common-law rule of successor corporate liability in strict products liability and negligence suits.

Nearly sixty years ago, Justice Brandeis explained in *Erie R.R. v. Tompkins*:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

304 U.S. 64, 78 (1938). Since then, this Court has repeatedly cautioned "that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981). Accordingly, the judiciary may create federal common law only when clearly authorized by statute, or to protect *uniquely* federal interests. *Texas Indus. Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981). Neither exception even arguably applies here.

Even were the Court tempted to throw into question sixty years of its settled and fundamental jurisprudence, the Court should be cautioned that in light of the particular facts of this case, Mr. Jordan ultimately seeks the adoption of a federal common-law rule of successor liability *unlike* the rule adopted by any State. As the First Circuit explained:

> Jordan's argument ultimately is that the "product line" doctrine of successor liability should be adopted. . . . It is far from clear the product line doctrine would assist Jordan. This doctrine is at most a minority rule which has plainly not been adopted by Maine.

Jordan, 62 F.3d at 32-33 (citations omitted); *see Flaugher v. Cone Automatic Mach. Co.*, 30 Ohio St. 3d 60, 507 N.E. 2d 331, 337 (1987) ("the 'product line' exception to corporate successor non-liability is a far-reaching and radical departure from traditional principles, such that its adoption is a matter for the legislature rather than the courts").

CONCLUSION

Because no issue of federal law is at stake, the Court should deny Mr. Jordan's petition for a writ of certiorari.

Respectfully submitted,

DAVID C. KING
Counsel of Record
BRENT A. SINGER
RUDMAN & WINCHELL
Attorneys for Respondent
Hawker Dayton Corporation
84 Harlow Street
P.O. Box 1401
Bangor, Maine 04402-1401
(207) 947-4501